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OCT 12

Nos. 79-67 and 79-148

Supreme Court, U.S.
FILED
SEP 28 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM WALTER, PETITIONER

v.

UNITED STATES OF AMERICA

ARTHUR RANDALL SANDERS, JR., ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. I-36)¹ is reported at 592 F. 2d 788.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1979. A petition for rehearing was denied on June

¹"Pet. App." refers to the appendix to the petition in No. 79-67.

15, 1979 (Pet. App. 37-39). The petitions for a writ of certiorari were filed on July 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether five reels of film, which were given to the government by a private party, should have been suppressed as the fruit of an unlawful search and seizure in the circumstances of this case (Nos. 79-67 and 79-148).
2. Whether the district court correctly instructed the jury to determine obscenity according to the standards of the average person in the community (Nos. 79-67 and 79-148).
3. Whether there was sufficient evidence to prove petitioner Walter's scienter (No. 79-67).
4. Whether the jury should have been instructed that the films, which were homosexual in nature, were obscene only if they appealed to the prurient interests of homosexuals (No. 79-67).
5. Whether petitioners were denied a fair trial by the alleged inattention of a juror (No. 79-67).
6. Whether the district court should have permitted more extensive questioning of prospective jurors on voir dire (No. 79-67).
7. Whether petitioner Walter should have been granted a severance (No. 79-67).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioners Walter, Sanders and Gulf Coast News Agency, Inc., were convicted on five counts of transporting obscene films in interstate commerce, in violation of 18 U.S.C. 1465, and

on five counts of using a common carrier to transport obscene films in interstate commerce in violation of 18 U.S.C. 1462. All petitioners were convicted on one count of conspiracy, in violation of 18 U.S.C. 371. Petitioners Walter and Sanders were sentenced to concurrent terms of three years' imprisonment on all counts. Petitioner Trans World America, Inc., was fined \$10,000 and petitioner Gulf Coast News Agency, Inc., was fined \$3,000 on each count for a total fine of \$33,000. The court of appeals affirmed, Judge Wisdom dissenting (Pet. App. 1-36).

1. The evidence adduced at a pretrial suppression hearing and at trial showed that petitioners Walter and Sanders were business partners who owned a network of adult cinemas, bookstores and distribution warehouses, including co-petitioners, Gulf Coast News Agency, Inc., and Trans World America, Inc.

On September 25, 1975, an employee of Gulf Coast News, using the fictitious name "D and L Distributors," shipped twelve cartons of film by Greyhound Bus Package Express from St. Petersburg, Florida, to Atlanta, Georgia. The packages were addressed to "Leggs, Inc.," a fictitious name for Trans World America, and were marked "will call," meaning that the addressee was to call for the packages at the Greyhound station (Pet. App. 3; VII Tr. 11-13, 19).

Upon arrival of the packages in Atlanta, Greyhound forwarded the shipment to a nearby substation for retrieval by L'Eggs Products, Inc., a manufacturer of women's hosiery, whom Greyhound mistakenly believed was the intended recipient (Pet. App. 3-4; XII Tr. 33-35). In response to notification by Greyhound of the shipment's arrival, L'Eggs Products sent an employee to pick up the package. The employee, who thought the packages looked unusual, opened one, determined the

contents to be pornographic films and returned to his company to report the incident. Thereafter another employee of L'Eggs Products, Inc., picked up the cartons and transported them to the firm's plant in Chamblee, Georgia. At the plant the area manager of the hosiery company opened all twelve cartons and ascertained that they contained a series of homosexual films entitled "David's Boys" (Pet. App. 4; XII Tr. 57-66). One side of each individual film box depicted two nude men kissing while the other side explicitly described the sexual conduct portrayed in the film (see Pet. App. 4). The area manager held up one reel of film to the light but was unable to clearly view the frames. He then called the FBI, reported that he had mistakenly received a shipment of obscene films which he did not want and asked the FBI to pick up the films (*ibid.*; XII Tr. 65-57, 121-126, 144). Five days later, L'Eggs Products, Inc., voluntarily turned over the shipment to the FBI.

The FBI, unaware of the identity of the shipper or intended recipient, told employees at Greyhound and L'Eggs Product to try to get the name or phone number of anyone who inquired about the shipment (XII Tr. 51, 207-208). About two weeks after L'Eggs Products turned the films over to the FBI, petitioners discovered the whereabouts of their shipment² (XII Tr. 125; IV Tr. 3-9 (testimony of Gray)); (IV Tr. 45 (testimony of Sanders))³.

²Contrary to petitioners' claims (No. 79-67 Pet. 10; No. 79-148 Pet. 6), the district court found that there was no credible evidence that the FBI told L'Eggs or Greyhound to conceal the whereabouts of the films (IV Tr. 108). Indeed, L'Eggs told petitioners that they gave the cartons to the FBI (IV Tr. 3-9 (testimony of Gray)).

³Volume IV of the transcript includes additional, separately paginated parts each containing the testimony of Michael Gray (a co-defendant who pleaded guilty) and petitioner Sanders.

Petitioners were indicted on April 6, 1977, on charges relating to five of the films in the shipment. The first time that petitioners sought to have their films returned was on June 3, 1977—21 months after the shipment—when they filed a motion for the return of the films and their suppression in evidence.⁴ On August 9, 1977, the district court denied the suppression motion (IV Tr. 107-116).⁵ Petitioners were thereafter convicted on all counts.

The court of appeals affirmed. With respect to petitioners' Fourth Amendment claims, the court held that there had been no search or seizure by the government, and therefore no Fourth Amendment violation (Pet. App. 1-17). Judge Wisdom dissented on the ground that the FBI's holding the film for two years without a judicial determination of obscenity constituted a prior restraint (Pet. App. 18-36). The court denied rehearing in a brief opinion, in which the court noted that even if the government's retention of the films had constituted a "prior restraint," the proper remedy would be return of the films but not their suppression in evidence (Pet. App. 38-39).

ARGUMENT

1. Petitioners first argue (No. 79-67 Pet. 17-28; No. 79-148 Pet. 7-10) that the five reels of film should have been suppressed at trial as the product of an illegal search and seizure.⁶

⁴Only Sanders and Walter joined in this motion.

⁵As to the motion to return the films, the district court reserved ruling to await the outcome of trial which was to commence the next day (IV Tr. 116).

⁶As the court of appeals correctly held (Pet. App. 8), this claim is available only to petitioners Walter and Sanders, and not the corporate petitioners, since they did not move to suppress the evidence prior to trial. Fed. R. Crim. P. 12(b)(3).

As the court of appeals correctly held, however, there was neither a search nor a seizure by the government in this case and accordingly no basis for the exclusion of the films at trial. It is well settled that an unlawful search and seizure conducted by a private party, without government involvement, does not violate the Fourth Amendment and accordingly, does not trigger the exclusionary rule. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *Coolidge v. New Hampshire*, 403 U.S. 443, 487-490 (1971). Even if the acceptance and inspection of an interstate shipment by the apparent addressee could be called a search or seizure (much less an unlawful one), those actions were taken by employees of L'Eggs Products. Employees of that firm picked up the shipment, opened all twelve cartons and viewed one film. The FBI was not even notified until after these events had occurred. L'Eggs Products then asked the FBI to take the shipment. Nor was receipt by the FBI of the twelve open cartons a seizure. See *Coolidge v. New Hampshire*, *supra*, 403 U.S. at 487. As the Ninth Circuit has stated, "[a] consensual transfer is by definition not a seizure." *United States v. Sherwin*, 539 F. 2d 1, 7 (1976) (en banc).

Petitioners allege, however, that the decision below and the decision in *Sherwin* conflict with *United States v. Kelly*, 529 F. 2d 1365 (8th Cir. 1976), on the question whether the government must obtain a warrant prior to accepting from a common carrier materials that are arguably protected by the First Amendment. Although the court below correctly held (Pet. App. 8) that "*Kelly* conflicts with the reasoning implicit in a long line of private search decisions," the facts in *Kelly* are significantly different from this case. In *Kelly*, United Parcel Service notified the government that a package it was transporting was ripped open, revealing pornographic books and magazines. With the carrier's consent, the government

removed several samples from the open carton and the carrier shipped the remaining items to the intended recipient. Here, by contrast, L'Eggs Products took the cartons from the common carrier, inspected their contents and later turned them over to the FBI. Moreover, in this case petitioners themselves are largely responsible for whatever "search" and "seizure" resulted by addressing the shipment to a fictitious addressee under a name very similar to L'Eggs Products. In sum, although we believe that *Kelly* was wrongly decided, no conflict is squarely presented by this case.

The court of appeals was also correct (Pet. App. 9-12) in rejecting petitioners' further claim (No. 79-67 Pet. 23-31; No. 79-148 Pet. 9-10) that the subsequent viewing of the films by the FBI constituted a separate "search" for which a warrant was required. When the FBI received the materials, the shipping cartons were already open, exposing the individual film boxes, which proclaimed their contents with photographs and explicit descriptions of the conduct portrayed on each film. These explicit descriptions eliminated any reasonable expectation of privacy petitioners might otherwise have had in the contents of the films. See *Lewis v. United States*, 385 U.S. 206, 211 (1966).⁷

Moreover, the FBI agents viewed the films only after a L'Eggs Products employee had examined the films and had ascertained their apparently obscene nature. This fact distinguishes the present case from *United States v. Haes*, 551 F. 2d 767 (8th Cir. 1977), on which petitioners rely for an alleged conflict. In *Haes*, an air freight company

⁷These facts distinguish this case from *United States v. Chadwick*, 433 U.S. 1 (1977), on which petitioners rely. *Chadwick* involved the search of a locked footlocker that gave no surface indication of its contents.

(Emery) discovered that it was transporting a shipment of pornographic materials and called the FBI. Without releasing the materials, Emery permitted the FBI to view some of the films with the aid of a projector, although Emery had not attempted to view any of the films. The court held that the films should have been suppressed on this ground (551 F. 2d at 771-772; footnote omitted):

The further actions by the FBI in bringing a projector to the Emery offices and viewing the films by themselves, extending over a two hour period and without any further participation or prior viewing by Emery employees, changed the nature of the search. * * * We would feel otherwise if the private search had included any sort of viewing of the films and a determination of possible obscenity prior to turning the films over to the FBI.

Here, a L'Eggs Products employee viewed one film and determined the possible obscenity of the other films by reading their descriptions on the individual boxes, prior to turning the films over to the FBI. Cf. *United States v. Pryba*, 502 F. 2d 391 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127 (1975). On these facts, there is no reason to suppose that the Eighth Circuit in *Haes* would have disagreed with the Fifth Circuit here.

2. Petitioners also contend (No. 79-67 Pet. 29-31; No. 79-148 Pet. 7-8) that the retention of the films by the FBI until the date of trial without an adversary hearing or other judicial determination of obscenity required suppression of the films at trial. That contention is incorrect.

This Court has held that before the government can initially seize materials from their owner that are arguably protected by the First Amendment, the Fourth Amendment requires that it must obtain a judicial (but non-

adversary) determination of their probable obscenity; and before it can permanently restrain the publication of such materials (e.g., by destroying them), the First Amendment requires that it must provide the owner with an adversary hearing. See *Heller v. New York*, 413 U.S. 483, 488-493 (1973); *Roaden v. Kentucky*, 413 U.S. 496, 501-506 (1973). The government did not violate those principles in this case.

First, there was no violation of Fourth Amendment requirements because the government did not seize the films from petitioners but simply accepted them from a willing third party. Such acceptance was not a Fourth Amendment seizure, and this Court has never suggested that the government must obtain a judicial determination of probable obscenity before accepting materials that are voluntary tendered to it.

If petitioners had sought the return of the films, they might have an argument that the government's continued retention required a judicial determination of probable obscenity. But they never made such a request until they filed their motion to suppress—21 months after the shipment—although the record establishes that they knew that the FBI had the films shortly after the shipment was misdelivered. The Fourth Amendment does not require the government to seek a judicial determination sua sponte and in the absence of any request by the owner in order to retain materials it has lawfully acquired. Cf. *Heller v. New York*, *supra*, 413 U.S. at 490.

There was also no violation of First Amendment principles in this case. As in *Heller v. New York*, *supra*, 413 U.S. at 490, the FBI's actions in this case did not constitute any form of "final restraint," but amounted at most to a temporary detention of the films in order to preserve them as evidence. Moreover, even if the length of

the detention could be regarded as a "form of censorship" (*ibid.*) that was impermissible in the absence of an adversary hearing,⁸ the proper remedy for such a First Amendment violation would be return of the films, not the suppression of evidence. See *Heller v. New York*, *supra*, 413 U.S. at 493 n.11; *United States v. Bush*, 582 F. 2d 1016, 1021 (5th Cir. 1978); *United States v. Womack*, 509 F. 2d 368, 382-383 n.48 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975).

3. The district court instructed the jury that obscenity is determined by the standards of the "average person of the community as a whole," whom the court described as a person having an "average and normal attitude toward, and an average interest in, sex" (Tr. XI 14-15; No. 79-67 Pet. App. 17). Petitioners contend (No. 79-67 Pet. 33-34; No. 79-148 Pet. 10) that the instruction should have stated specifically that the average person must be drawn from the "adult" community only. *Pinkus v. United States*, 436 U.S. 293 (1978), on which petitioners rely, does not require such an instruction. In *Pinkus* the district court specifically charged that "children" and the "young" were part of the community and this Court concluded that it was error to give such an instruction. See also, *United States v. Bush*, *supra*, 582 F. 2d at 1021. In the present case, children were never mentioned and, as the court of appeals correctly held, the jury "instruction adequately directed jury consideration to the contemporary [community] standards of adults * * *" (Pet. App. 17).

⁸Again, since petitioners never requested such a hearing, any conclusion that the length of the government's retention of these documents constituted a form of censorship would be unwarranted. *Heller v. New York*, *supra*, 413 U.S. at 490.

4. Petitioner Walter claims (No. 79-67 Pet. 31-32) that there was insufficient evidence that he knew of, participated in, or consented to the acts charged in the indictment. This claim is refuted by the record. As the court of appeals correctly summarized the evidence (Pet. App. 14-15), it showed that Walter and Sanders jointly owned and operated an extensive network of adult cinemas, bookstores, and distribution warehouses, including co-petitioners' Gulf Coast News Agency, Inc. and Trans World America; that Walter was active in directing the day-to-day operations of the business and was frequently seen on the premises of both Gulf Coast News Agency, Inc. (the shipper of the cartons of film) and Trans World America (the intended recipient); and that he told employees that Trans World America was being established to distribute sexually explicit materials. From this evidence the jury could conclude beyond a reasonable doubt that Walter knew of and participated in the acts and agreements charged in the indictment.⁹

5. Petitioner Walter argues (No. 79-67 Pet. 34-35) that the jury should have been instructed that the film had to appeal to the prurient interest only of homosexuals and not of the average person in the community, because the films were intended for a homosexual audience. No such instruction has been required by this Court's decisions, which have approved instructions which allow the jury to consider the prurient appeal of materials to either the "average person" or members of a deviant sexual group (see, e.g., *Pinkus v. United States*, *supra*, 436 U.S. at 301-303; *Hamling v. United States*, 418 U.S. 87, 128-130

⁹Petitioner Walter's apparent contention (No. 79-67 Pet. 32 n.7) that the government must prove that he knew that the films were legally obscene was rejected in *Hamling v. United States*, 418 U.S. 87, 123-124 (1974).

(1974); *Mishkin v. New York*, 383 U.S. 502, 505-509 (1966), and such an instruction was given here (XI Tr. 214-216). Indeed, the court even identified the deviant group as homosexuals (XI Tr. 216). The jury in this case must have found beyond a reasonable doubt that the films appealed to the prurient interest of either the average person or homosexuals. This is all that is required to satisfy the "prurient appeal" prong of the *Miller v. California*, 413 U.S. 15 (1973), three-part test for obscenity.

6. Petitioner Walter further contends (No. 79-67 Pet. 36) that one juror was inattentive during the screening of the films and therefore could not properly judge their literary, artistic, political or scientific value. The district court disagreed, "I don't think the situation is one of such inattentiveness as requires intervention by me at this time" (VIII Tr. D-125). The court of appeals also found the claim meritless (Pet. App. 17). There is no reason to disturb this finding of fact concurred in by both lower courts. See *Berenyi v. Immigration Director*, 385 U.S. 630, 636 (1967).

7. Petitioner Walter complains (No. 79-67 Pet. 37-38) that the district court did not examine the jurors enough on voir dire. The scope of the examination of jurors on voir dire is within the discretion of the trial court (*Smith v. United States*, 431 U.S. 291, 308 (1977)), and there was no abuse of that discretion here. While there would have been no error in asking the jurors how long they had resided in the community, such a question is not constitutionally required. In any event each juror had resided in the community at least one year, a time sufficient to provide familiarity with local standards (II Tr. Doc. 61 and 62). The trial court was not required to permit questioning on the juror's knowledge of homosexual conduct. Nor, as petitioner contends, can familiarity

with community standards be ascertained by determining whether a juror has been exposed to pornographic materials.

7. Petitioner Walter's claim (No. 79-67 Pet. 38-39) that he should have been granted a severance is insubstantial. He contends that had he been granted a severance, Michael Grassi would have testified in his behalf but would not do so in a joint trial because petitioner Sanders' attorney could impeach Grassi's testimony with past criminal offenses. But Walter had no right to have Grassi testify free from an attack on his credibility, which could have been impeached by the prosecutor in any event. Walter also alleges that hearsay statements of Sanders were admitted against him, yet he fails to document his claim. In these circumstances, the district court did not abuse its discretion when it denied Walter's motion to sever (See IX Tr. 119-121).¹⁰

¹⁰Petitioner Walter's final claim (No. 79-67 Pet. 39-40) is that the jury should have been instructed on his theory that, because each community contains men and women, the average member of the community is a "transsexual." This claim is frivolous.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

SEPTEMBER 1979